



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

May 24, 2016 Government Records Council Meeting

I Be Allah
Complainant

Complaint Nos. 2015-293

v.

NJ Department of Corrections
Custodian of Record

At the May 24, 2016 public meeting, the Government Records Council (“Council”) considered the May 17, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian has borne his burden of proof that he lawfully denied access to records related to the inmate’s designation as being part of a security threat group. Young v. NJ Dep’t of Corr., GRC Complaint No. 2014-377 (September 2015). Kimpton v. NJ Dep’t of Corr. GRC Complaint No. 2014-333 (July 2015). The records contain “emergency or security information or procedures for any building or facility, which, if disclosed, would jeopardize security of the building or facility or the persons therein.” N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6. Further, the records are exempt because they are material relating to an identified individual which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement. N.J.A.C. 10A:22-2.3(a)(5). Such denial is also lawfully consistent with the restrictions on dissemination prescribed in 28 CFR 23 and the authority granted by N.J.S.A. 47:1A-9. N.J.S.A. 30:1B-6(g); *See* Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (2012).

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 24th Day of May, 2016

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 27, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 24, 2016 Council Meeting**

**I Be Allah¹
Complainant**

GRC Complaint No. 2015-293

v.

**New Jersey Department of Corrections,²
Custodial Agency**

Records Relevant to Complaint: Copies of all records “supporting or demonstrating the decision to designate” the Complainant as a member of a security threat group.

Custodian of Record: John Falvey

Request Received by Custodian: July 6, 2015

Response Made by Custodian: July 15, 2015; July 29, 2015; August 13, 2015

GRC Complaint Received: September 14, 2015

Background³

Request and Response:

On July 6, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 13, 2015, following two ten (10) day extensions of time, the Custodian responded in writing to deny access, asserting several reasons for denial. The Custodian cited the exemption for “emergency or security information or procedures for any buildings . . .” and “security measures and surveillance techniques which . . . would create a risk to the safety of persons [or] property.” N.J.S.A. 47:1A-1. The Custodian also noted that the records sought are Special Investigations Division (“SID”) investigations records, where “redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility.” N.J.A.C. 10A:22-2.3(a)(2). Further, the Custodian cited the Departmental exemption for documents “relating to an identified individual which . . . would jeopardize the safety of any person or the safe and secure operation of the correctional facility . . .” N.J.A.C. 10A:22-2.3(a)(5). Finally, the Custodian cited N.J.S.A. 47:1A-9, noting that 28 CFR 23:20(e) prohibits disclosure of the requested records except in the performance of law enforcement activity.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On September 14, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that one of the exemptions raised by the Custodian did not apply to him: that disclosure could create a risk to the safety of other persons at the correctional facility. He reasoned that his designation as a member of a security threat group had been made years earlier and that if another inmate had informed on him, that inmate “may not today be in the custody of the DOC.” Further, he argued that the designation makes him subject to “quasi-disciplinary and enhanced security measures” that do not afford him appropriate due process protections.

Statement of Information:

On October 9, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 6, 2015. The Custodian also certified that he contacted the SID, which runs the Department of Corrections’ (“DOC”) Intelligence Center, in order to search for responsive records. The SID, he stated, is responsible for identifying members of a Security Threat Group (“STG”). He noted that the DOC expressly prohibits any inmate from possessing or exhibiting STG material and engaging in activities associated with or related to STGs. He described the responsive records as letters that discuss STG membership, explain goals, and encourage the reader to learn more about the STG. Also included, he said, were an intelligence report and identification form that detail how the letters and the inmate are related to an identified STG. The Custodian argued that the requested materials could be used to recruit new members, incite violence, and encourage others to act on behalf of the STG. He further stated that the release of the records could “thwart the Department’s mission to prevent membership[,] . . . prevent STG activity and prevent this literature from entering the facility.” He also stressed that the material requested is contraband in a correctional facility. The Custodian further certified that the records are part of the SID’s intelligence database and that the GRC has previously held that information contained therein is exempt from disclosure, *citing Pavlyik v. NJ Dep’t of Corr.*, GRC Complaint No. 2014-94 (October 2014). Finally, he argued that the DOC has “broad discretionary powers” to promulgate regulations aimed at maintaining security and order inside correctional facilities. *Citing Jenkins v. Fauver*, 108 N.J. 239, 252 (1987).

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6. Further, “[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority

of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” N.J.S.A. 47:1A-9(a).

The Council has previously recognized that N.J.S.A. 30:1B-6(g) provides the DOC Commissioner broad discretionary powers to determine matters of public policy and regulate the institutions under his jurisdiction. See Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (2012) (citing N.J.S.A. 30:1B-6(g)). Those powers include formulating and adopting policies pertaining to security and order within correctional institutions. See Jenkins, 108 N.J. 239; Russo v. NJ Dep’t of Corr., 324 N.J. Super. 576, 584 (App. Div. 1999).

In Young v. NJ Dep’t of Corr., GRC Complaint No. 2014-377 (September 2015), the Complainant was an inmate, who claimed he had been charged with participating in activity related to an STG and requested all corresponding reports and documents. The custodian denied access to some of the records, arguing *inter alia* that the records contained emergency or security information, the disclosure of which could jeopardize the security of the building or facility or persons therein. The GRC agreed that disclosure would “pose a significant risk to the safe and secure operation” of the prison. The GRC reasoned that the records contained intelligence-gathering methods that inmates could exploit. Further the GRC found that release of the records, which contained the complainant’s and other inmates’ identities, would create a substantial risk of retaliation, directly conflicting with DOC regulations. Young, citing N.J.A.C. 10:A-22-2.3 (b). Also citing Cordero v. Dep’t of Corr., GRC Complaint No. 2012-209 (June 2013).

In Kimpton v. NJ Dep’t of Corr. GRC Complaint No. 2014-333 (July 2015), the custodian withheld a report that discussed the criteria for high risk security designation and internal management procedures for transporting high risk inmates. The inmate argued that he needed the reports in order to contest the DOC’s designation of him as a high risk inmate and that denying him the material deprived him of his Due Process rights. The GRC upheld the denial, agreeing with the Custodian that disclosure of either record posed a significant risk to the safe and secure operation of the prison.

Here, the Custodian certified that the records withheld would reveal intelligence gathering capabilities and expose inmates, including the Complainant, to retaliation. Both of those concerns, he argued, jeopardize the DOC’s ability to maintain a safe and secure environment. The GRC is persuaded that the DOC cannot effectively maintain a safe environment if analyses and reports of STGs are made available to either inmates or the general public. N.J.A.C. 10A:22-2.3(a)(2); N.J.A.C. 10A:22-2.3(a)(5). Like the records used for classification of an inmate as a “high risk” in Young, here the release of materials used to designate the inmate as connected to an STG would substantially compromise policies pertaining to maintaining security and order within correctional institutions.⁴ “The provisions of OPRA

⁴ The GRC’s holding in this matter does not necessarily maintain, as implied by the Custodian, that *all* information contained in the SID database is exempt or that it is exempt purely because it is housed in the database. Pavlyik, GRC 2014-94, did not rely on the fact that the records withheld (sound recordings of telephone calls made at the prison) were part of the database. Almost any record can be part of a database, and the mere placement of material there cannot form a basis for a complete exemption in the absence of a specific statutory classification. Nor can it be maintained that records are exempt merely because they constitute contraband, as someone other than an inmate could make the same request.

cannot abrogate exemptions made pursuant to promulgated regulations via a state agency.” *Id.*, citing N.J.S.A. 47:1A-9.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to records related to the inmate’s designation as being part of a security threat group. Young, GRC 2014-377. Kimpton, GRC 2014-333. The records contain “emergency or security information or procedures for any building or facility, which, if disclosed, would jeopardize security of the building or facility or the persons therein.” N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6. Further, the records are exempt because they are material relating to an identified individual which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement. N.J.A.C. 10A:22-2.3(a)(5). Such denial is also lawfully consistent with the restrictions on dissemination prescribed in 28 CFR 23 and the authority granted by N.J.S.A. 47:1A-9. N.J.S.A. 30:1B-6(g); See Harris, GRC 2011-65.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne his burden of proof that he lawfully denied access to records related to the inmate’s designation as being part of a security threat group. Young v. NJ Dep’t of Corr., GRC Complaint No. 2014-377 (September 2015). Kimpton v. NJ Dep’t of Corr. GRC Complaint No. 2014-333 (July 2015). The records contain “emergency or security information or procedures for any building or facility, which, if disclosed, would jeopardize security of the building or facility or the persons therein.” N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6. Further, the records are exempt because they are material relating to an identified individual which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement. N.J.A.C. 10A:22-2.3(a)(5). Such denial is also lawfully consistent with the restrictions on dissemination prescribed in 28 CFR 23 and the authority granted by N.J.S.A. 47:1A-9. N.J.S.A. 30:1B-6(g); See Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (2012).

Prepared By: Ernest Bongiovanni
Staff Attorney

May 17, 2016